Racial Segregation and Cultural Domination: A Rubin Trilogy on Title VII

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The many tributes to Judge Rubin in this volume and from so many other quarters attest to his reputation as a brilliant jurist, an incredibly hard worker, an intellectual with wide-ranging interests and a man who cared deeply about legal ethics. To this list, I would also add that Judge Rubin had a reputation for being a "liberal" judge. As a political label, liberalism is not much in fashion these days. Liberals are outnumbered on the federal bench and are no longer able to shape legal doctrines expansively to fulfill 1960s and 1970s ideals of equality and justice. The liberal label is diffuse; I suspect that it can attach to any judge who is not consistently pro-business or who, on occasion at least, is willing to expand individual rights.

For this essay I read Judge Rubin's opinions on Title VII to see whether the liberal label could be said to fit these opinions and, if it did, to attempt to describe his individual brand of liberalism. Not surprisingly, most of these Title VII cases involve procedural rulings and fact-bound disputes that give little indication of the Judge's broader substantive views. In a few significant cases, however, Judge Rubin delved deeply into the record to uncover the specific pattern of racial segregation presented in the case, and he offered a compelling interpretation of Title VII to prohibit the denial of access suffered by the plaintiff. These cases also illustrate that Judge Rubin had little patience with employers who passed over qualified minority workers for no good reason. To my mind, his willingness to question traditional patterns of racial hierarchy in employment and to insist that employers take the opportunity to diversify their workforces by hiring and promoting good employees mark Rubin as liberal. The same liberal label may not fit quite so well, however, when it comes to describing Rubin's views on challenges to the legality of working conditions and the working environment, rather than his response to complaints about lack of access and maintenance of segregation.

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Historically the Fifth Circuit has been a very important site for the development of anti-discrimination law.[1] The Fifth Circuit cases decided in the first decade after the passage of the Civil Rights Act of 1964 held out the promise of an end to racial segregation and stratification in the workplace.[2] Class actions attacking policies on hiring, promotion and transfer "across the board,"[3] judicial mistrust of subjective procedures[4] and a presumption of discrimination in a high percentage of individual cases[5] gave plaintiffs leverage to challenge longstanding traditions of racial segregation. The challenge posed by these early cases was cut short, however, by a retreat by the United States Supreme Court starting in the late 1970s. By the 1980s, patterns of racial segregation were more often defended in the courts as a product of choice or custom, rather than as an artifact of discrimination.[6] The class action had all but disappeared from the scene,[7] and high burdens of proof had been imposed on plaintiffs trying to show either intentional discrimination[8] or group-based adverse impact.[9] The focus of Title VII changed from the creation of new opportunities through hiring, promotion, and affirmative action to a far less ambitious emphasis on

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1. Deborah J. Barrow & Thomas G. Walker, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform (1988); see, e.g., Jack Bass, Unlikely Heroes (1981); Alfred W. Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Industrial Rel. L.J. 313, 322-24, 340-44 (1984); Jerome M. Culp, A New Employment Policy for the 1980's: Learning From the Victories and Defeats of Twenty Years of Title VII, 37 Rutgers L. Rev. 895, 900-02 (1985).

2. Blumrosen describes this line of cases as a "southern jurisprudence" that was "calculated to simplify the attack on segregated employment systems." Blumrosen, supra note 1, at 340, 342. He regards the Fourth and Fifth Circuits as "particularly influential," in part because "[t]he judges in the other circuits seemed to defer informally to their counterparts in the south who had intimately experienced the relationship between racial segregation and employment practices." Id. at 342.

3. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

4. Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

5. See Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); East v. Romine, Inc., 518 F.2d 332, 339-40 (5th Cir. 1975).

6. See Vicki Schultz & Stephen Petterson, Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, U. Chi. L. Rev. (forthcoming).

7. See John J. Donahue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 1019-21 (1991).

8. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) (burden of persuasion rests with plaintiff in disparate treatment cases).

9. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658, 109 S. Ct. 2115, 2125 (1989) (burden of proving lack of business justification rests with plaintiff in disparate impact suit). The Civil Rights Act of 1991 reversed this aspect of *Wards Cove* by placing the burden on the employer to demonstrate "that the challenged practice is job related for the position in question and consistent with business necessity." Pub. L. No. 102-166, § 105(a)(i) (codified in 42 U.S.C. 1981).

curtailing dismissals and layoffs of protected groups.[10] When they surfaced, liberal visions of equality were often submerged in dissents.

For this essay I have selected three Title VII cases that I believe illustrate the contours and limits of Judge Rubin's liberalism on matters of race and ethnicity in the workplace. They are part of this new generation of Title VII cases, decided in the conservative 1980s and 1990s. The employers prevailed in each case, with Judge Rubin registering two strong dissents in *EEOC v. Kimbrough Investment Co.*[11] and *Hill v. Mississippi State Employment Service.*[12] However, in one case, *Garcia v. Gloor,*[13] Rubin wrote to uphold employer prerogative in opposition to the position taken by the EEOC.

Each of the cases deals with the legal concept of business need—the level and type of justification that an employer must put forward to overcome a showing of harm by a minority employee. In the employment discrimination area, business need is one of those basic considerations that marks the terrain between lawful and unlawful practices. Whether the claim is framed as one of intentional discrimination ("disparate treatment") or unintentional discrimination ("disparate impact"), the court's view of the reasonableness and efficacy of the employer's practice is likely to affect the outcome.

The Rubin dissents in *Kimbrough* and *Hill* have a similar theme: minority employees should not be prevented from attaining better jobs simply because of traditional practices or informal ways of doing business. In these cases, Rubin supported black plaintiffs seeking access to white-dominated jobs because the defendants could not offer any sound business reasons for their rejections. This absence of business need prompted Rubin to find intentional disparate treatment in *Hill*[14] and unintentional disparate impact in *Kimbrough.*[15] Unless it could be established that perpetuation of traditional patterns was somehow good for business, Rubin believed that Title VII required change.

In striking contrast, in *Garcia v. Gloor,* Rubin refused to require an employer in Brownsville, Texas to supply a reason for its rule forbidding employees to speak Spanish on the job.[16] The employer's preference for English was honored, without a further showing of business need. Questions of access and desegregation were not directly at issue in *Garcia* because the workforce was predominantly Hispanic. Faced with a claim centering on cultural domination rather than workplace

10. Donahue & Siegelman, supra note 7, at 984.
11. 703 F.2d 98 (5th Cir. 1983).
12. 918 F.2d 1233 (5th Cir. 1990).
13. 618 F.2d 264 (5th Cir. 1980).
14. See infra text accompanying notes 51-90.
15. See infra text accompanying notes 17-50.
16. See infra text accompanying notes 91-123.

demographics, Judge Rubin interpreted Title VII to support employer demands for assimilation. *Garcia* stands opposed to most contemporary "liberal" views of cultural diversity.

EEOC v. Kimbrough Investment Co.—Segregating by Word of Mouth

Kimbrough was a class action challenging racial segregation at the Biloxi Sheraton during the 1970s. The pattern at the Sheraton was a familiar one: black employees were mostly relegated to servant/menial jobs concentrated in the kitchen, housekeeping and the bellstand.[17] Whites held the jobs which called for more sustained contact with hotel guests (front desk, bartender, cocktail waitress), or which required nonphysical labor or the exercise of judgment (security, office, sales, accounting, maintenance).[18]

The racial hierarchy was sustained largely by informal procedures. Jobs were filled by word of mouth.[19] Openings were not posted or advertised and hiring was done by department supervisors on a subjective basis.[20] Except for two supervisors of black departments, all the supervisors at the hotel were white.[21]

The only peculiar feature of this otherwise classic example of a standardless, subjective selection process was a folder system, instituted by the hotel four years after its opening.[22] Under the folder system, a white security guard was assigned to accept written application forms from applicants, although there was still no posting or listing of vacancies. There was evidence that the guard sometimes used racial steering to direct blacks to apply for jobs only in black departments or to encourage them to list a job in a black department as their first choice.[23] If applicants indicated that they would accept any job, their application was placed in the "Anything" folder.[24]

When the applications were forwarded to the front office, they were placed in the folder corresponding only to the applicant's first choice.[25]

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17. EEOC v. Kimbrough Inv. Co., 703 F.2d 98, 105-06 (5th Cir. 1983) (Rubin, J., dissenting).

18. A snapshot of the workforce in 1974 indicated, for example, that of the twelve departments at the hotel, eight were completely segregated and only two had more than token integration. Brief of the Equal Employment Opportunity Commission at 9-10, *Kimbrough* (Nos. 81-4429, 82-4043).

19. 703 F.2d at 104 (Rubin, J., dissenting).

20. Id.

21. Id.

22. Id. at 101.

23. Id. at 104 n.2 (Rubin, J., dissenting).

24. Id. at 104 (Rubin, J., dissenting).

25. Id.

Those persons who had not indicated a specific preference were out of luck because applications in the Anything folder were never considered.[26]

The strategy of the hotel was to explain away the pattern of segregation on the basis of freedom of choice. In its brief to the Fifth Circuit, the defendant argued that blacks "gravitated" to black departments in part because they already knew people who worked in those jobs,[27] most notably the black chef employed at the Sheraton who the hotel repeatedly referred to as a co-founder of the local NAACP.[28] Admitting that there were instances in which black employees possessed the qualifications for jobs in white departments,[29] the hotel nevertheless insisted that blacks lacked interest in these jobs or should be presumed to lack interest because they never applied.[30] The hotel's only justification for the folder system was that it accommodated an applicant's preference.[31] It dismissed any harm to blacks caused by the hotel's failure to consider the applicants in the Anything folder as insubstantial or unsubstantiated, in part because many of the applicants were not identified by race.[32]

The hotel's explanations were accepted by the magistrate trying the case and affirmed by a majority of the appellate panel. On appeal the EEOC pointed to the disparate impact of the folder system, rather than relying solely on a theory of classwide disparate treatment.[33] In ruling for the hotel, however, the panel seemed most impressed by the magistrate's conclusion that, under the folder system, whites and blacks were *treated* the same.[34] Pointing to the low percentages of blacks who had applied for jobs in white departments, the majority concluded that the hotel's employment practices were "rooted in legitimate business reasons,"[35] without relating any specific justification for the hotel's use

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26. Id.

27. Brief of Kimbrough Investment Company at 17-18, *Kimbrough* (Nos. 81-4429, 82-4043).

28. Id. at 4-5, 22-23.

29. Id. at 20.

30. Id. at 21-22.

31. Id. at 26.

32. Id. at 28.

33. Brief of the Equal Employment Opportunity Commission at 44-45, *Kimbrough* (Nos. 81-4429, 82-4043); Reply Brief of the Equal Employment Opportunity Commission at 6-7, *Kimbrough* (Nos. 81-4429, 82-4043).

34. 703 F.2d at 101 (quoting magistrate's finding that "the facts fail to indicate that blacks were treated any differently than whites under the folder system"). In his dissent, Rubin argued that this conclusion of no disparate treatment was irrelevant to plaintiff's disparate impact claim. Id. at 105 (Rubin, J., dissenting). He also disputed the accuracy of the conclusion, given the proof of racial steering by the guard administering the folder. Id. at 104 (Rubin, J., dissenting).

35. Id. at 102 (quoting Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. 1981)).

of the folder system or for its disregard of applicants who made the mistake of admitting that they were willing to accept anything.

Judge Rubin's dissent in *Kimbrough* is the kind of meticulous opinion whose power to persuade comes from the care with which he documents each statement with specifics from the record and his remarkable ability to bring testimony to life by recounting the most telling details of the patterns of segregation at the Sheraton. Rubin's opinion provides us with an understanding of the subtleties of segregation in the post-Civil Rights era.

In several revealing footnotes, Rubin summarized the testimony of black employees to explain how people were discouraged from seeking nontraditional jobs. In some instances, blacks were told that the only openings were in black departments.[36] This presented a problem for someone who needed a job but preferred work in a white department: the folder system provided no effective way for an employee to play it safe by applying for a job in a black department, while simultaneously indicating an active interest in vacancies in white departments. The failure to post job vacancies also meant, of course, that there was no easy way of verifying whether the word-of-mouth information black employees received from those in charge of the folder was accurate. Not surprisingly, blacks often found out about jobs only from other black employees who knew of openings in black departments.[37] In this respect, the folder system was a perfect complement to the word-of-mouth system because, while it looked like a race-neutral general hiring procedure, blacks could still not compete effectively with whites for jobs in white departments without being told about vacancies or given encouragement to apply.

Rubin's dissent also detailed how the system at the hotel resulted in the underemployment of black employees with special skills and experience. One black applicant, for example, had training as a guard in the military; he was never considered for the security guard vacancies at the hotel, however, because he had listed "busboy" first on his application.[38] Rubin's close reading of the record enabled him to expose this cruel feature of a segregated system. I suspect that a common reaction of hotel guests when they see "busboys" is to assume that the reason these men are working in this low-ranking job is because they lack the education or training for better jobs. When minorities occupy low status jobs, this tends to reinforce cultural beliefs about minorities' lack of qualifications and may prevent many people from recognizing that job segregation is not inevitable. In his understated, facts-only

36. Id. at 104 n.2 (Rubin, J., dissenting).

37. Brief of Equal Employment Opportunity Commission at 50-51, *Kimbrough* (Nos. 81-4429, 82-4043).

38. 703 F.2d at 104 n.3 (Rubin, J., dissenting).

fashion, Rubin managed to dispel the validity of such a common assumption and in the process to reveal something about the human cost of racial segregation.

Rubin offered this picture of how segregation functioned at the Sheraton by way of "background" or factual context for his analysis of the specific issue of whether the folder system violated Title VII. At the time *Kimbrough* was decided, the controlling Fifth Circuit precedent placed the burden of proof on the employer in disparate impact cases to show the business necessity of practices that excluded a disproportionate number of minority applicants.[39] Because Rubin concluded that the folder system played a role in the perpetuation of racially segregated departments, he argued that the hotel was required to show a business need for the system. He then recounted "every word of testimony"[40] by which the hotel sought to establish business necessity. The best the hotel could offer was to explain that it would have been burdensome to resort to more than one folder to find interested applicants.[41] It gave no reason at all for its failure to select from the Anything folder. The solution of having applicants fill out multiple application forms if they were interested in more than one job was instituted only after the EEOC filed suit.[42] To Rubin's mind, this weak justification clearly failed to meet the employer's burden; he concluded that the hotel had shown no business necessity or indeed any evidence of job-relatedness for the practice.[43]

Rubin used his dissent in *Kimbrough* to fight a trend in Title VII cases to conflate disparate treatment and disparate impact theories[44] and to water down the business necessity requirement in disparate impact

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39. See Johnson v. Uncle Ben's Inc., 657 F.2d 750, 753 (5th Cir. 1981), cert. denied, 459 U.S. 967, 103 S. Ct. 293 (1982). At that time, however, there was considerable debate as to whether subjective procedures, as well as objective procedures, should be subjected to disparate impact analysis and whether the plaintiff had the obligation to pinpoint the specific practice or practices causing the impact. See Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795 (5th Cir. 1982). The Supreme Court has since made it clear that subjective procedures may be challenged in a disparate impact case. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 991, 108 S. Ct. 2777, 2787 (1988). The Civil Rights Act of 1991 provides that plaintiffs must identify the specific practice or practices causing the disparate impact, unless "the elements of a respondent's [employer's] decisionmaking process are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (1992).

40. 703 F.2d at 107 (Rubin, J., dissenting).

41. Id. at 107 n.12 (Rubin, J., dissenting).

42. Id.

43. 703 F.2d at 107 (Rubin, J., dissenting).

44. See Hannah Arterian Furnish, A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After *Beazer* and *Burdine*, 23 B.C. L. Rev. 419 (1982).

suits.[45] He stressed that if the issue in the case was the unjustified disparate impact of the folder system, it did not matter that the system had been instituted without discriminatory intent and that on its face the folder system treated blacks and whites the same.[46] One important feature of disparate impact theory is that it dispenses with the need to show intent at all when the harm is systemic, that is, when the plaintiff shows adverse impact on blacks as a group.[47] Rubin objected to the magistrate's and to the panel majority's lapses into a rhetoric of intent, betraying their resistance to such a non-intent-based system of liability. Rubin also wanted to assure that the standard for rebutting a prima facie case in disparate treatment cases—the articulation of a legitimate business reason—did not become confused with the more stringent business necessity standard.[48]

In his final analysis, however, Rubin concluded that the folder system was invalid under either the lenient or the stringent test for business need. Perhaps anticipating the troubled future of disparate impact litigation, he argued that the plaintiff was entitled to win under disparate treatment standards. The fact that the employer regarded the folder system as convenient was not equivalent to an articulation of an adequate business rationale for the system. Rubin maintained that "even were business reason enough, there is no evidence in the record to support the existence of any business reason for this separation of departments by race save the fact that 'it had always been done this way.' That traditional consideration is not a legitimate business reason."[49]

Because Rubin regarded the folder system as one of the ways that segregation was actively maintained by the hotel, he was not willing to credit the explanation that segregation was simply a reflection of the choices made by minority applicants. For the panel majority, segregation at the hotel was voluntary, reflecting a preference by minority workers for black departments. The majority was neither willing to presume discrimination from the fact of segregation, nor to look very closely at the hiring practices to discover the interrelationship between actual job preferences and specific hiring practices. In contrast, Rubin looked for an explanation for segregation in the structures and procedures of the hotel and was not willing to presume that blacks were satisfied with

45. See Note, Business Necessity: Judicial Dualism and the Search for Adequate Standards, 15 Ga. L. Rev. 376 (1981).

46. 703 F.2d at 105 (Rubin, J., dissenting).

47. See Martha Chamallas, Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 UCLA L. Rev. 305, 334-43 (1983).

48. 703 F.2d at 106-07 (Rubin, J., dissenting).

49. Id. at 106 (Rubin, J., dissenting).

their traditional place in the employment hierarchy. The hotel's casual disregard for the expression of interest of those applicants who were willing to take "Anything" troubled Rubin, perhaps because he realized that segregation was resilient and that not much would change in the absence of legal incentives. Rubin's final point in *Kimbrough* eloquently emphasized the need for an expansive interpretation of Title VII: "We must require the removal of even those walls created by the paper-thin layers of a file folder that become impenetrable racial barriers."[50]

Hill v. Mississippi State Employment Service— Segregating by Negligence

Hill was not a typical race segregation case. The defendant in *Hill* was a state employment agency, rather than an employer. The claim was that the agency discriminated against Hazel Hill, a black applicant, by failing to refer her to jobs for which she was qualified. I consider *Hill* to be about racial segregation, however, because the essence of Hill's claim was that the agency steered her into jobs that were predominately and stereotypically black and denied her opportunities for higher-paying integrated employment.

Unlike so many individual claims of employment discrimination, Hill's claim was well developed by her attorneys from the Southeast Mississippi Legal Services. She was able to document specific instances in which the agency failed to refer her for a job at the same time it referred white applicants, many of whom had less experience than Hill.[51] Hill also gathered extensive statistical data about the pattern of referrals by the agency.[52]

The agency followed a complicated, partly subjective process of matching applicants to available openings. Every applicant was given a code based on the Dictionary of Occupational Titles that reflected the applicant's job preferences.[53] Often, however, applicants were referred out of code, and the referral clerk was under no strict obligation to refer all applicants with the appropriate code.[54] Referrals might be based on the clerk's assessment of such factors as the applicant's attitude, appearance, personality, or employment history.[55] The records also revealed that the agency sometimes referred fewer applicants than the number requested by the employer.[56]

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50. Id. at 108 (Rubin, J., dissenting).
51. Hill v. Mississippi State Employment Serv., 918 F.2d 1233, 1235-36 n.5, 1242-43 (5th Cir. 1990).
52. Id. at 1236-38.
53. Id. at 1235.
54. Id. at 1236.
55. Id. at 1235.
56. Id. at 1237.

Hill was interested in finding a job as a cashier or waitress, primarily because those jobs typically paid more than the minimum wage Hill received when she worked as a counter-attendant for fast food chains.[57] Her case was based on both statistical data and on specific instances of disparate treatment based on race. Hill's expert analyzed the data on referrals from the agency's computer and found statistically significant differences between white and black referrals for the codes relating to waitress, cocktail waitress and cashier jobs.[58] The agency's expert contested the significance of the analysis, however, because the data did not control for qualifications and there was no way to discover this information for the large numbers of cases involved.[59] However, even defendant's experts conceded that after controlling for qualifications, the racial disparities would not likely disappear, although the magnitude of the disparity might decrease.[60]

The uncontested evidence was directly related to Hill: she proved that the agency failed to refer her for four desirable jobs for which she was qualified.[61] The details of these incidents were telling. In one case, the agency referred twenty-two whites for a cashier job and no black applicants. Several of the whites were referred out of code and several lacked the requisite experience or education.[62] At this time, Hill was referred only for jobs as a housekeeper and counter attendant.[63] Just after filing the complaint on behalf of Hill, Legal Services even sent a "tester," a white woman attorney, to the agency seeking referral for waitress jobs. The tester was referred to two jobs, even though Hill had been told that same day by another clerk that there were no waitress positions available.[64]

The result in *Hill* is surprising; Hill lost even though she proved a great portion of her factual case. Both the magistrate and the panel majority agreed that the four instances of failure to refer established a prima facie case of discrimination. The majority held, however, that the agency adequately rebutted the inference of intentional discrimination by asserting that Hill's treatment resulted from the general inefficiency of its referral system.[65] The panel majority accepted the agency's explanation that Hill's harm was likely caused by employee oversight, or a failure to communicate among staff or an inability to contact the

57. Id. at 1242 (Rubin, J., dissenting).
58. Id. at 1237.
59. Id.
60. Id. at 1237, 1240, 1243.
61. Id. at 1235-36 n.5, 1242-43.
62. Id. at 1242 (Rubin, J., dissenting).
63. Id. (Rubin, J., dissenting).
64. Id. at 1243 (Rubin, J., dissenting).
65. Id. at 1239.

relevant people, in short, by "inefficiencies inherent in a large, heavily-utilized, bureaucratic, and undermanned system with limited resources."[66] Once employer negligence was counted as a legitimate business reason to rebut the inference of discrimination, Hill was left with her statistical case to show that the agency's explanation was pretextual. Because the majority believed that the unrefined statistics were not enough to prove "pretext,"[67] it affirmed the judgment for the agency. While stating that it did not condone inefficiency, the majority thought that it would be "the height of unfairness"[68] to infer discrimination from the fact of negligent mistreatment of minority applicants.

I would describe Judge Rubin's dissent as that of controlled rage. His opinion made it clear that he had little tolerance for lack of care, particularly on the part of government employees. He viewed the employees at the agency as putting up a "united front"[69] to protect their employer from liability, ironically claiming that it was their negligence and inefficiency that produced Hill's injuries. Rubin was simply not willing to let the agency off the hook by pointing to the ineptitude of its employees:

> The Mississippi State Employment Service is not a disembodied entity on high that functions independently of its employees. It is itself the *deus ex machina* that puts the actors on the stage and directs them. The allegedly inefficient, regulation-hamstrung, overworked employees whom it has hired and through whom it functions *are* the MSES. It may not wash its hands of the spots, whether damned or merely discriminatory, by which their actions have stained the MSES.[70]

Rubin was also very skeptical of the neutrality of the actions of the agency employees, inefficient or otherwise. He began his analysis with the proposition that subjective selection processes tend to facilitate discrimination.[71] Besides general assertions of problems in its operations, the agency offered no comparative evidence of instances when black applicants had been referred over more qualified (or equally qualified) white applicants. Rubin found the agency's excuses unpersuasive and unbelievable and expressed his point aptly, using the example of a cashier, the job that Hill was denied:

> The coincidence of such employee error consistently operating to the detriment of Hill strains credulity. A cashier may some-

66. Id.
67. Id. at 1240.
68. Id. at 1239.
69. Id. at 1243 (Rubin, J., dissenting).
70. Id. at 1241 (Rubin, J., dissenting).
71. Id. at 1243 (Rubin, J., dissenting).

> times be "short," that is, she may sometimes turn in less cash than her register records, but if this is due to error, then she ought also, at least on some occasions, to be "over," having more cash than the register records. There is reason to suspect the employee who is always short and never over.[72]

A striking feature of Rubin's dissent in *Hill*, like his dissent in *Kimbrough*, is his ability to explain the cultural significance of the evidence and his careful attention to the record. The majority buried in a footnote the critical evidence of Hill's treatment on those four specific occasions in which she was not referred for jobs.[73] Rubin fully described each incident in the text of his opinion[74] and showed how the agency's treatment of Hill was harmful. In particular, Rubin would not accept at face value the agency's defense that it had caused Hill little harm because it had referred her to "alternative positions" during the same time period. Showing that he understood the intricate workings of racial segregation in Mississippi, Judge Rubin explained that these alternative positions were all "stereotypical for black persons in the deep south."[75] In one passage Rubin translated the cultural meaning of the agency's referrals, noting that Hill had been referred to a "motel as a 'housekeeper,' a euphemism for a maid; to two fast-food chains, Church's and Kentucky Fried Chicken as a 'cashier,' and to another as a counter helper. These were in effect jobs making beds or serving fried chicken."[76] With this short discussion, Rubin was able to convey that racial segregation in employment is not only a matter of simple economics, but also implicates the right of minorities to escape confining stereotypes destructive of their individual dignity and subjectivity.

For legal support of his view that Hill had been treated unfairly, Rubin offered a straightforward, yet innovative, interpretation of Title VII in cases of individual disparate treatment. In these cases, the defendant's burden on rebuttal is to articulate a "legitimate, nondiscriminatory reason" for its actions.[77] Rubin argued that the term "legitimate" should mean more than simply non-criminal or not forbidden by law.[78] To justify a discriminatory effect in individual cases, Rubin would require a showing of business justification that fits the purposes of Title VII: "A legitimate reason must be in some degree related to job efficiency,

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72. Id.

73. Id. at 1235-36 n.5.

74. Id. at 1242-43 (Rubin, J., dissenting).

75. Id. at 1242 (Rubin, J., dissenting).

76. Id.

77. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)).

78. 918 F.2d at 1243 (Rubin, J., dissenting).

the employer's needs, or the applicant's qualifications."[79] It would not be enough, for example, for an employer like the agency in *Hill* to defend simply by alleging a lack of racial animus, if the practice made no business sense.

Rubin's definition of "legitimate reason" treats workers and employers as if they are engaged in a common enterprise and share common interests. Quoting from the leading Supreme Court case, *McDonnell Douglas Corp. v. Green*,[80] Rubin emphasized that, under Title VII, "[t]he broad overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."[81] This common interest in fairness and efficiency is not served by malfeasance and negligence. To allow the employer to defend by proving its own negligence assumes that only employers are truly interested in efficiency. Rubin believed this to be false and argued that "[t]he need for efficiency constitutes a defense in disparate-treatment cases. It would be ironic if the employer's claim of its own inefficiency also served as a defense."[82]

Not many cases have considered this threshold question of what constitutes a "legitimate" reason for purposes of rebutting a case of disparate treatment.[83] A narrow interpretation of Title VII would prohibit only decisions in which the employee could prove that the employer actively desired the harm because of racial animus. The labeling of disparate treatment as a form of "intentional" discrimination has encouraged some courts to read "legitimate" as mere surplusage, adding nothing to the requirement that the employer's action not be specifically motivated by racial bias.[84] In one case,[85] for example, the employer admitted that it did not even consider the minority plaintiff for a job because it had unlawfully pre-selected another employee for the post. The court found no Title VII violation, however, because the defendant

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79. Id. at 1244 (Rubin, J., dissenting).

80. 411 U.S. 792, 93 S. Ct. 1817 (1973).

81. 918 F.2d at 1244 (Rubin, J., dissenting) (quoting McDonnell Douglas v. Green, 411 U.S. at 801, 93 S. Ct. at 1823).

82. Id. at 1244 (Rubin, J., dissenting).

83. Commentators addressing the issue have taken differing positions. Compare Mack A. Player, Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis, 36 Mercer L. Rev. 855, 877-78 (1985) (arbitrary or irrational reasons are not "legitimate") with Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L. Rev. 59, 139 (1991) ("legitimate" reason "should include *any* nondiscriminatory reason upon which the employer *in fact* relied").

84. See Lamphere v. Brown Univ., 685 F.2d 743, 750 n.2 (1st Cir. 1982), vacated, 798 F.2d 532 (1st Cir. 1986); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

85. Gaballah v. Johnson, 629 F.2d 1191 (7th Cir. 1980).

was not thinking about the plaintiff's ethnicity when it violated its hiring rules.

Rubin's approach in *Hill* would impose liability in cases in which segregation or other kinds of racially marked harms are caused or maintained by employer negligence. Although such a cause of action for negligent discrimination has yet to be recognized by the courts,[86] there is nothing in the text or legislative history of Title VII to prevent this development. Endorsement of disparate impact theory demonstrates that a showing of discriminatory motivation is not the only way to prove actionable discrimination. The recent affirmation of a cause of action for sexual harassment[87] also suggests that courts are sometimes willing to find Title VII violations, even if supervisors or other employees sincerely believe that they harbor no hostility or ill will toward the people they offend. Title VII allows considerable room for judicial creativity, as the sharp shifts in interpretation of the statute in the recent past so well illustrate.

Admittedly, the Rubin approach to disparate treatment goes against the current conservative grain. It is reminiscent of early Fifth Circuit precedent, notably *East v. Romine, Inc.*,[88] which required employers in disparate treatment cases to show that the person they selected was better qualified than the black plaintiff. The reasoning in these early cases was that unless the employer could make such a showing, there was no compelling reason why the court should not further the goal of Title VII by encouraging the advancement of qualified minority workers. When the Supreme Court in 1981 rejected *Romine* and finally allocated the burden of persuasion in individual disparate treatment cases to the plaintiff,[89] it gave employers the right to make mistakes about the relative qualifications of employees competing for jobs without facing automatic liability. This allocation also made it extremely difficult for minority employees to prevail in the absence either of direct evidence of discriminatory attitudes or a track record of selecting demonstrably less qualified nonminority employees for the same job.

Rubin's limitation of "legitimate" to job-related reasons is faithful to the Supreme Court's allocation of burdens of proof, but does not

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86. I am indebted to my colleague, Jean Love, for this important observation about the limits of Title VII liability. Love questions the soundness of permitting a form of strict liability via disparate impact, yet denying a cause of action for individual disparate treatment produced by employer negligence. At least one court has allowed recovery in such a negligence context. See Roberts v. Gadsen Memorial Hosp., 835 F.2d 793 (11th Cir. 1988).

87. See generally Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986).

88. 518 F.2d 332 (5th Cir. 1975).

89. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

let the employer escape an evaluation of its selection processes altogether by preemptively admitting that its actions are bad for business. Most importantly, I believe that Rubin's approach takes into account the perspective of the minority employee.[90] To qualify as legitimate, the reason must be one that would be acceptable to a reasonable employee who shared the assessment of the underlying facts. It is no consolation for employees to discover that they lost out on a job because they were completely overlooked or because the employer used an arbitrary procedure. When the agency in *Hill* failed to notify the plaintiff of available job prospects and the hotel in *Kimbrough* disregarded the applicants in the Anything folder, their inaction signaled that the interests of minority employees had very low priority. Even if it would not change the result in many cases, Rubin's interpretation of Title VII affirms the judgment that it is unfair and unwise to impede the advancement of minority employees when there is no possible benefit to be gained. His approach gives higher priority to ending racial segregation and racial hierarchy in employment and is more responsive to the perspective of minority workers.

Garcia v. Gloor—Language, Cultural Identity and Employer Prerogative

Unfortunately, the Title VII opinion by Judge Rubin most often reprinted in casebooks[91] does not illustrate his approach to racial segregation. Being one of the few cases to confront an English-only rule, *Garcia v. Gloor*[92] stands as strong support for an employer's prerogative—even in the absence of business need—to prohibit bilingual employees from speaking Spanish on the job.

Garcia involved a charge of unlawful discharge in violation of Title VII's prohibition against discrimination on the basis of national origin. Hector Garcia, the plaintiff, worked as a salesman for a lumber supply

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90. The issue of perspective is becoming increasingly important in employment discrimination law, particularly in cases challenging hostile work environments. See Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 Texas J. of Women & the Law 95 (1992). Perhaps the fullest elaboration of the significance of perspective in legal disputes is Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (1990). See also Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

91. See, e.g., James E. Jones, Jr., William P. Murphy & Robert Belton, Discrimination in Employment 430-35 (5th ed. 1987); Michael J. Zimmer, Charles A. Sullivan & Richard F. Richards, Cases and Materials on Employment Discrimination 334-39 (1982).

92. 618 F.2d 264 (5th Cir. 1980). The original opinion, also in support of the employer, was withdrawn. Garcia v. Gloor, 609 F.2d 156 (5th Cir. 1980). Some significant changes to the text were made in the final version. See infra note 104.

store in Brownsville, Texas. Born in the United States of Mexican ancestry, Garcia was completely fluent in both English and Spanish.[93] He regarded Spanish as his primary language, however, and always spoke Spanish in his home.[94]

Garcia was fired for violating Gloor's rule against speaking Spanish.[95] The rule required employees to speak English except when they were waiting on Spanish-speaking customers or during work breaks. The incident which most immediately prompted the firing was Gloor's overhearing Garcia respond in Spanish to a question from another Mexican-American salesman. Garcia also admitted that he violated the English-only rule frequently[96] and testified that he found the rule difficult to follow.[97]

The lumber supply store was located in a community that was 75% Hispanic.[98] Most of the employees at Gloor were Hispanic (31 out of 39),[99] including the group of salesmen (7 out of 8).[100] Gloor nevertheless took the position that there were valid business reasons for the English-only rule. He argued that English-speaking customers objected to communications they could not understand and that supervisors who did not speak Spanish could better oversee subordinates who were required to speak English.[101] Gloor also claimed that the English-only rule encouraged employees to improve their English and helped to assure that they could understand trade publications printed only in English.[102]

Judge Rubin's opinion for a unanimous panel found no discrimination, without ever reaching the question of the adequacy or plausibility of Gloor's arguments about business need. The critical move in Rubin's analysis was his judgment that requiring Hispanic employees to speak English had no disparate impact on that group and could not be said to raise an inference of intentional discrimination. Rubin saw no link to a prohibited classification and thus was able to dismiss any harm produced by the English-only rule as something other than discrimination. Because he believed that Garcia had failed to establish a prima

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93. 618 F.2d at 266, 268.

94. Id. at 266.

95. Id. *Garcia* was actually a mixed motivation case. Gloor claimed that Garcia's firing was also due to job-related deficiencies, such as failing to keep his inventory current and replenish his stock. However, Judge Rubin assumed, for purposes of the appeal, that violation of the English-only rule was a substantial factor in Garcia's termination. Id. at 268.

96. Id. at 267.

97. Id. at 266.

98. Id. at 267.

99. Id.

100. Id.

101. Id.

102. Id.

facie case, Rubin placed himself in the uncharacteristic position of arguing that, even if wholly arbitrary, the policy was nevertheless lawful under Title VII: "The EEO Act does not prohibit all arbitrary employment practices. It does not forbid employers to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all. It is directed only at specific impermissible bases of discrimination—race, color, religion, sex, or national origin."[103]

Rubin reasoned that, on its face, the English-only rule did not discriminate on the basis of national origin[104] and focused on whether the language requirement was a form of indirect or covert discrimination. There was little question that the impact of the rule fell disproportionately on persons whose primary language was Spanish rather than English, the majority of whom were Mexican-Americans. The EEOC argued for a straightforward application of disparate impact theory that would require Gloor to prove business necessity.[105] To avoid this result, however, Rubin carved out an exception to the application of disparate impact for rules "that the affected employee can readily observe and nonobservance is a matter of individual preference."[106] When applied to Garcia, the new "mutable condition" exception meant that his fluency in English prevented the negative impact of the rule from being recognized as legally relevant. Rubin did not regard the English-only rule as a hardship for bilingual employees, nor did he believe that it produced an atmosphere of ethnic oppression. That Garcia was prevented from exercising his language preference was said to be "related more closely to the employer's choice of how to run his business than to equality of opportunity."[107] In a footnote,[108] Rubin indicated that he recognized some difficulty with this analysis. The mutable condition exception bore an uncomfortable resemblance to the discredited line of "sex plus" cases[109]

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103. Id. at 269.

104. In the final opinion, Rubin concluded that "[n]either the statute nor common understanding equates national origin with the language that one chooses to speak." Id. at 268. In the withdrawn opinion, Rubin took the more extreme position that Garcia's national origin could not be Mexican because he was born in the United States. Garcia v. Gloor, 609 F.2d 156, 161 (5th Cir. 1980).

105. Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980).

106. Id. at 270.

107. Id. at 269 (quoting Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1091 (1975)).

108. Id. at 269-70 n.6.

109. The term "sex-plus" was coined by Judge Brown in dissent in Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting from denial of rehearing en banc) in which a Fifth Circuit panel upheld a ban on hiring mothers with pre-school age children. 411 F.2d 1 (5th Cir. 1969). The ruling was subsequently reversed by the Supreme Court. 400 U.S. 542, 91 S. Ct. 496 (1971). For a discussion of the history of the sex-plus doctrine, see Martha Chamallas, Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs, 1984 Univ. of Ill. L. Rev. 1, 9-17.

that had attempted to limit Title VII's protection only to rules which applied to all women (excluding, for example, discrimination against subgroups of married women or women with preschool age children). Even the landmark disparate impact case—*Griggs v. Duke Power Co.*[110]—had involved scrutiny of a mutable condition. In theory, the high school education requirement struck down in *Griggs* posed no insuperable obstacle for minority employees, especially since the employer in *Griggs* had a special program to help finance the costs of education for its minority employees.[111] Without further analysis, Rubin recognized the apparent inconsistency and simply stated that some mutable conditions are forms of "disguised discrimination either in intent or effect."[112]

It is likely that Rubin regarded the English-only rule as a barrier of a different magnitude than the high school education requirement in *Griggs*. He may have believed that it was easy for Garcia to comply with the rule and keep his job, compared to the burden of obtaining a high school diploma imposed on the employees at Duke Power. This assumes, of course, that compliance with an English-only rule is hard only for persons who are not completely fluent in English. It does not take into account the cultural meaning of the rule or any harm stemming from subordination of ethnic group members who resist assimilation.

Further, although this point is not explicitly mentioned in the opinion, the existence of the English-only rule likely had no "bottom line" effect[113] of reducing the percentage of Hispanic employees at the lumber supply store below that of the surrounding geographic area. From the statistics given, it appeared that defendant's workforce was neither disproportionately Anglo nor ethnically stratified. The rule operated only to shape the working environment and did not significantly affect the demographics at the workplace.

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110. 401 U.S. 424, 91 S. Ct. 849 (1971).

111. Griggs v. Duke Power Co., 420 F.2d 1225, 1233 (4th Cir. 1970).

112. 618 F.2d at 269-70 n.6. Rubin gives the example of a rule forbidding smoking on the job, which he argues would be lawful even if it could be proven that "most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined." Id. at 270. Presumably, such an anti-smoking rule would not be "disguised discrimination in effect," despite its adverse impact, because employees can choose not to smoke on the job. It is unclear whether Rubin's mutable condition exception would also apply to race specific policies. Under Rubin's analysis, for example, a ban on smoking applying only to African-American employees could be upheld, provided the employer harbored no racial animus toward the group, e.g., a black-owned business with a stated concern for the shorter life expectancy of African-Americans.

113. When *Garcia* was decided, the Supreme Court had not yet decided whether employers could defend against charges of disparate impact by claiming that their work forces were racially balanced, the so-called "bottom line" defense. The Court subsequently rejected the defense in Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525 (1982).

Rubin also had to answer Garcia's contention that the rule was invalid under disparate treatment analysis as intentional discrimination against Hispanics. Garcia argued that persons whose primary language was English were granted a privilege to converse in that language, a privilege that was denied to Garcia and other Hispanic employees.[114] The question was whether language was closely enough linked to national origin in this case to raise an inference of covert disparate treatment. An expert witness called by the plaintiff testified that "the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others."[115] By focusing on the importance of language to cultural identity, Garcia challenged the neutrality of the English-only rule which privileged not only those persons fluent in English, but those persons whose cultural identity was affirmed by establishing English as the norm in the workplace. Assuming that the rule served no business need, it functioned primarily as a cultural marker to indicate that Gloor Lumber was an Anglo business even if the vast majority of the employees and customers were Hispanic. From Garcia's perspective, there was no salient difference between such a rejection of Mexican-American cultural life and the kind of ethnic animus more widely acknowledged as prejudice.

While he did not totally dismiss the link between language and cultural identity, Rubin denied it legal significance, again relying on the notion of "choice" to delegitimate the injury to Garcia. Rubin insisted that

> the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. . . .
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> . . . [Garcia's] argument thus reduces itself to a contention that the statute permits employees to speak the tongue they prefer. We do not think the statute permits this interpretation, whether the preference be slight or strong or even one closely related to self-identity.[116]

For Rubin, some degree of cultural assimilation or suppression of cultural identity was expected of employees. Those persons who might be fired for their failure to conform were seen as casualties of their own choices rather than victims of an exclusionary workplace culture.

Similar to the problem of deciding which mutable conditions are disguised forms of discrimination, the disparate treatment analysis in *Garcia* raises the question of how much assimilation will be required

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114. 618 F.2d at 268.
115. Id. at 267.
116. Id. at 270.

of minority employees before cultural domination will be classified as discrimination. Even those prohibited classifications under Title VII, such as race and sex, commonly thought to be immutable, are also social constructions. Perceptions and responses related to race and sex, not race and sex in some essentialist sense, have a profound impact on people's lives. To take an extreme example, suppose that a white employer required a light-skinned black employee to hide her racial identity when interacting with white customers. The reason given is that white customers in this enterprise feel more comfortable dealing with persons of their own race and that the business would like to maintain its image as a white business. I cannot imagine that Judge Rubin would have regarded the employee's refusal to hide her identity as simply a "choice" she made or that he would have concluded that the employer could fire her without violating Title VII. If my speculation is correct, some concept other than immutability is needed to explain the difference in result.. The example shows that even skin color can be mutable, and, like the use of language, is merely culturally identified with race, not "race" itself.[117] We are still left with the question of precisely when the affirmation of cultural identity becomes an infringement on employer prerogative, rather than a protected expression of cultural diversity in the workplace.

My analysis leads me to believe that there is no escaping a qualitative judgment about just how important speaking Spanish is to Mexican-Americans and whether an employer ought to be required to justify an English-only rule. Recently, the Ninth Circuit in *Gutierrez v. Municipal Court*,[118] rejected *Garcia* and enjoined a similar English-only requirement enacted by a judicial district of the Los Angeles Municipal Court. Using a disparate impact analysis, the court stressed the close and important relationship between language and identity and took a hard look at the

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117. Paulette Caldwell has recently argued that the scope of legal protection ought to depend more on "historical and sociocultural associations with race or gender," rather than concepts of immutability. Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365, 387. She reasons that "stereotypes arise most often not from immutable traits but from negative associations with those traits. These associations are used to reinforce the notion that individuals and groups possessing such traits are intellectually, morally, and culturally inferior to members of the dominant group. Antidiscrimination law should be, and at its best is, directed toward the behavioral manifestations of such negative associations, not to line drawing based on fixed, immutable, and outmoded conceptions of race or gender." Id. See also Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329 (1991).

118. 838 F.2d 1031 (9th Cir.), vacated, 490 U.S. 1016, 109 S. Ct. 1736 (1989) (on grounds of mootness).

reasons given by the employer to support its rule.[119] When so exposed to judicial scrutiny, the reasons looked more like suspicions and expressions of fear about a minority group rather than legitimate business reasons. Thus, for example, the court discussed why the speaking of Spanish might have "unnerved" non-Spanish speaking supervisors by noting that "[u]nfortunately, monolingual persons may be threatened by the speaking of a language they themselves cannot speak."[120] It also refused to validate the rule solely to assuage the fears of non-Spanish speaking employees that Hispanics were using Spanish to talk behind their backs, in the absence of proof that Spanish had actually been used as a device to conceal the substance of conversations.[121] Underlying the court's analysis in *Gutierrez* is an assumption that English is not necessarily the exclusive or normal language in the workplace and that ignorance of Spanish, like other lack of abilities, can sometimes produce negative effects. Rather than focus solely on the Hispanic employee's choice not to speak English, the opinion implicitly teaches that monolingual employees have also chosen not to learn Spanish. In this context, what becomes important is the relationship among employees from different cultural backgrounds and how to respect their specific cultural identities and still run the business efficiently.

In contrast to *Kimbrough* and *Hill*, Judge Rubin was unwilling in *Garcia* to insist that practices which harm minority employees be discarded unless they serve a business need. I suspect that he did not regard the partial suppression of cultural identity as the same sort of harm as the racial segregation of jobs. In the decade that has passed since the ruling in *Garcia,* there has been increasing criticism of assimilation as the only model for anti-discrimination law[122] and more sustained efforts to redefine legal harms from the perspective of the victim.[123] Because this is a time in which "multiculturalism" figures prominently in so many discussions, it is easier now to find words to describe the

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119. 838 F.2d at 1038-1045. After *Garcia* was decided, the EEOC published guidelines dealing specifically with English-only rules. They permit limited English-only rules only if the rule is justified by business necessity. 29 C.F.R. § 1606.7 (1991). Although EEOC Guidelines are not binding on the courts, they often give them great deference. Albemarle Paper Co. v. Moody 422 U.S. 405, 431, 95 S. Ct. 2362, 2378 (1975).

120. 838 F.2d at 1042 n.15.

121. Id. at 1042.

122. Perhaps the most highly developed challenges have come from feminist scholars and litigators who have resisted legal standards implicity premised on male experiences and perspectives. They emphasize that women's differences from men should not serve as justification for unfavorable treatment and are skeptical that a denial of gender difference will produce justice for women. See, e.g., Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279 (1987); Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988).

123. See supra note 90.

harm suffered by Hector Garcia when he was forced to comply with the English-only rule. This tends to strengthen the case for imposing liability under Title VII, both under a disparate treatment and disparate impact framework.

In her recent book, *Justice and the Politics of Difference*,[124] Iris Young, a political philosopher, offers a rich description of the concept of oppression that is useful for reexamining Title VII doctrine. Two aspects of oppression—which she calls "exploitation" and "cultural imperialism"—provide a theoretical frame for the kinds of discrimination at issue in *Kimbrough* and *Hill* on the one hand and in *Garcia* on the other.

Young's notion of exploitation helps to describe the phenomenon of racial segregation. According to Young, exploitation consists of the "steady process of the transfer of the results of the labor of one social group to benefit another."[125] She explains how exploitation works so that "the energies of the have-nots are continuously expended to maintain and augment the power, status, and wealth of the haves."[126] Of particular relevance to Title VII law, Young regards the category of menial labor in this country as a racially specific form of exploitation. Young's concept of menial labor very closely resembles the system of racial segregation Rubin exposed in *Kimbrough* and *Hill*: "In our society there remains strong cultural pressure to fill servant jobs—bellhop, porter, chambermaid, busboy, and so on—with Black and Latino workers. These jobs entail a transfer of energies whereby the servers enhance the status of the served."[127]

Because Young perceives that both the actual phenomenon of segregation and its offensive character are sustained by culture, there is no clear line for her between job segregation and stratification and other forms of oppression, notably what she calls "cultural imperialism." By so stressing the cultural meaning of racial segregation, Young is able to connect it to oppression imposed through offensive working conditions, like the policy challenged in *Garcia*. This is a connection that Judge Rubin did not explore.

By cultural imperialism, Young means "the universalization of a dominant group's experience and culture, and its establishment as the norm."[128] This form of oppression renders the cultural identities of minority groups suspect because it allows dominant groups to "project their own experience as representative of humanity as such."[129] Perhaps

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124. Iris M. Young, Justice and the Politics of Difference (1990).
125. Id. at 49.
126. Id. at 50.
127. Id. at 52.
128. Id. at 59.
129. Id.

the most familiar example of this kind of oppression involves the historical exclusion of pregnancy as a medical condition entitling pregnant workers to sick and disability benefits and leaves. Because pregnant workers were viewed as deviating from the tacit norm of the male worker, their disability was regarded as qualitatively different from the medical conditions affecting male workers and was used to justify dismissals and other employment losses.

The concept of cultural imperialism can also be used to analyze the legal issue in *Garcia*. Thus one reason English-only rules are tolerated may be that the English language and Anglo-American culture are thought to be generically American, rather than merely one culturally specific form of American culture. Exposing the cultural specificity of the norm makes it possible to argue that there ought to be reasons other than tradition to support the norm, for if the norm is not supported by good business reasons, it serves only as a form of cultural domination.

There is still a great reluctance on the part of courts to find discrimination unless policies directly deny minorities access to better jobs. Only fairly recently have there been numerous rulings declaring that patterns of harassment and violence create hostile working environments in violation of Title VII.[130] It is difficult to mount a successful challenge to other less dramatic forms of cultural domination. In the 1990s, however, there is now available a body of theoretical work that supports expanding the definition of discrimination beyond a narrow, purely economic concept. It is also apparent that entrenched patterns of segregation are sustained by a complicated network of forces which will not be disconnected simply by guaranteeing formal legal access.

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By finally enacting the Civil Rights Act of 1991 over the strong resistance of President Bush,[131] Congress expressed its confidence that the courts could still play an important role in eliminating systemic discrimination in the workplace. The case most responsible for provoking the Congressional action—*Wards Cove Packing Co. v. Atonio*[132]—involved old-style racial segregation of the sort that Judge Rubin was so good at exposing and so astute in offering workable legal standards

130. For analyses of cases involving sexually hostile environments see Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 839-47 (1991); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1197-1220 (1989).

131. For discussions of the history behind the Civil Rights Act of 1991, see Michael J. Zimmer, Charles A. Sullivan & Richard F. Richards, Cases and Materials on Employment Discrimination, Professors' Update (Spring 1992); Lex K. Larson, Civil Rights Act of 1991 (1992).

132. 490 U.S. 642, 109 S. Ct. 2115 (1989).

aimed at its elimination. It saddens me to realize that we will not hear the voice of Judge Rubin interpret the new civil rights legislation. In this next important period of enforcement of anti-discrimination laws, we sorely need the wisdom of great liberal judges like Judge Rubin to help create a new vision of equal opportunity, a vision that recognizes a cultural as well as an economic dimension of discrimination.